IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

PORTLAND DIVISION

DIANE L. GRUBER and MARK RUNNELS, Plaintiffs, v. OREGON STATE BAR, a public corporation, CHRISTINE CONSTANTINO, President of the Oregon State Bar, HELEN HIERSCHBIEL, Executive Officer of the Oregon State Bar, Defendants.	)	Case No. 3:18-cv-01591-JR March 13, 2019 Portland, Oregon

ORAL ARGUMENT

TRANSCRIPT OF PROCEEDINGS

BEFORE THE HONORABLE JOLIE A. RUSSO

UNITED STATES DISTRICT COURT MAGISTRATE JUDGE

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PORTLAND DIVISION

DANIEL Z. CROWE, LAWRENCE K. PETERSON, and OREGON CIVIL LIBERTIES ATTORNEYS, Plaintiffs, v. OREGON STATE BAR, OREGON STATE BAR BOARD OF GOVERNORS, VANESSA A. NORDYKE, CHRISTINE CONSTANTINO, HELEN HIERSCHBIEL, KEITH PALEVSKY, and AMBER HOLLISTER, Defendants.	)	Case No. 3:18-cv-02139-JR
	)	March 13, 2019
	)	Portland, Oregon

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BEFORE THE HONORABLE JOLIE A. RUSSO

UNITED STATES DISTRICT COURT MAGISTRATE JUDGE

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TRANSCRIPT OF PROCEEDINGS

(March 13, 2019)

(In open court:)

THE COURT: Good morning. Thank you, everybody, for your time this morning. I wanted to let you know that I'm fortunate enough to have a law student and a couple of new lawyers working with me this semester, so they also had an opportunity to read the briefs. This is such an interesting case. I really appreciate the educational opportunity, as well, for the new lawyers.

DEPUTY COURTROOM CLERK: Shall I call the case, Your Honor?

THE COURT: I apologize. Please.

DEPUTY COURTROOM CLERK: We're here on two cases. The first case is Gruber, et al. v. Oregon State Bar. Civil No. 18-1591-JR. The other case is Crowe, et al. v. Oregon State Bar, et al. Civil No. 18-2139-JR.

THE COURT: Thank you.

First of all, I did read all of the briefing, and, again, I appreciate that. And I want to say I really did. I promise. I've read all the briefing. So if you could please focus your arguments on perhaps points that you think need to be gone over again that I might have missed. I would really appreciate that.

First of all, I will take judicial notice pursuant to FRE

201 of the Bar's bylaws and mission statement. It looks like defendants are conceding that the individual defendants are immune from a suit for damages, so the motion to dismiss based on qualified immunity is denied as moot. Plaintiffs also concede that the claims against the Board of Governors should be dismissed. Therefore, those claims are dismissed as well.

Regarding defendants' 12(b)(1) motion, asserting that this Court lacks subject matter jurisdiction over the Bar, I would ask the defendants, please, to focus on the Ninth Circuit's *Mitchell v. LA Community College* case. The five factors -- and it looks like specifically the first factor -- would a money judgment be satisfied out of State funds, it looks like the answer to that question is no.

The Ninth Circuit has instructed that that is the most significant factor that this Court should review. So I would like to hear from you on that.

To the plaintiffs, if you could comment on how this Court should distinguish the cases in this district and other districts throughout the Ninth Circuit holding that a state bar is, in fact, entitled to Eleventh Amendment immunity, and I'm looking at cases by Judge Stewart, Judge Acosta, Judge Hogan, Judge Frye, Judge Jelderks. Several of those cases having been affirmed by the Ninth Circuit.

And then if I can move to defendants' 12(b)(6) motion, failure to state a claim against the defendants, that claim

seems to focus on the Supreme Court's 1990 opinion in *Keller v. State Bar of California*.

As you know, plaintiffs, the Ninth Circuit affirmed, *Keller*'s application, as recently as March 2018, in *Caruso v. Washington State Bar Association*. I know you're arguing that the *Janus* -- the Supreme Court's *Janus* decision, on June 27, 2018, overruled *Abood* and impliedly overruled *Keller*.

I'm having trouble with the argument that *Keller* is overruled. Again, looking at the significant amount of authority out there, and, for example, I'm looking at a March 8, 2017, decision, *Eugster* - I may be mispronouncing that -- E-u-g-s-t-e-r -- *v. Washington State Bar Association* where the Ninth Circuit held that the district court properly dismissed plaintiff's claims relating to his compulsory membership in the Washington State Bar Association, finding mandatory membership constitutional, and then stating, contrary to plaintiff's contentions, this Court cannot overrule binding authority because, quote, a decision of the Supreme Court will control that corner of the law unless and until the Supreme Court itself overrules or modifies it.

So I would appreciate a comment from plaintiffs on that line of authority.

And I'm happy to hear from either side first. Defendants? Thank you.

MR. WILKER: Your Honor, Steven Wilker. I'm one of

the counsel for the defendants.

I'll address the Eleventh Amendment issues you raised earlier at the start of your comments. While the first factor in *Mitchell* is -- is an important factor, it is not a dispositive factor. There are five factors in the analysis, and the core purpose, as the Supreme Court said of Eleventh Amendment immunity is to afford the State the dignity of its separate sovereignty. And in this case it is undeniable that the State Bar is an instrumentality of the State of Oregon. It's an entity that performs a regulatory function.

It performs an important regulatory function as an arm of the Judicial Department. And to allow it to be sued in federal court, that doesn't prevent it from being sued in state court. It just prevents it from being sued in federal court because of the strictures of the Eleventh Amendment as they have been applied by the U.S. Supreme Court and by the Ninth Circuit.

And that factor is substantially important here, and our considered view is why the Ninth Circuit and the other district -- other districts in this circuit have repeatedly held that state bars are, in fact, immune under the Eleventh Amendment.

There was a suggestion in, I believe, one of the briefs filed by the Gruber -- the Gruber plaintiffs, that *Keller* was in federal court. *Keller* wasn't. *Keller* came up through the state court system and was on review to the U.S. Supreme Court

from the California Supreme Court. *Keller* does not resolve the issue.

Therefore, from our perspective, because you need to afford the State of Oregon the dignity of its separate sovereignty, that factor has to have the most importance in this analysis and is why the Ninth Circuit and other districts -- and other districts in this circuit have repeatedly held that the state bars are, in fact, immune.

The other factors can be argued either way. That the State Bar can hold property doesn't disqualify it from being an arm of the State. It clearly performs State functions. It's subject to multiple state laws as if it were a formal agency of the Executive Branch. It's subject to public records. It's subject to public meetings. It is simply not sufficiently separate to justify the Court's departure in holding the State Bar subject to suit in this federal court, and that's why we brought the motion, Your Honor.

The Bar dignity as part of the State's sovereignty should be respected, and the claims against the Bar as an entity should be dismissed.

THE COURT: Thank you.

Good morning.

MR. HUEBERT: Good morning, Your Honor. Jacob Huebert for the Crowe plaintiffs.

It appears to be undisputed here that three of the --

three of the factors appear to be undisputed. There's the fact that the judgment would not be payable out of the State Treasury. There's the fact that the State Bar is an entity that can sue and be sued, and there's the fact that the State Bar is an entity that can hold property in its own name.

So that just leaves two factors that are really in dispute here. One of which is the one that the defendants are emphasizing. The question of whether the State Bar performs a centralized government function. And in the briefs, the State Bar has focused on the fact that it -- it does perform a central role inasmuch as it -- it deals with attorneys throughout the state, not just in a particular locality. But a state bar doesn't exactly perform a governmental function at all as the Supreme Court recognized in *Keller*.

In *Keller*, the U.S. Supreme Court said for federal constitutional purposes a state bar association, a mandatory bar association, is more like a public sector union than it is like an ordinary state agency.

It said it performs more of an advisory role than an actual governmental role. It said that the State Bar is created not to participate in the general government of the state but to provide specialized professional advice to those with the ultimate responsibility of governing. That was true with the State Bar of California in *Keller*, and it's true with the Oregon State Bar here.

The Supreme Court has ultimate authority for admitting lawyers, disciplining lawyers, and exercising governmental power with respect to lawyers. The State Bar performs an advisory role in telling the Court who it thinks should be admitted, who it thinks should be disciplined; but, ultimately, the governmental function is performed by the Supreme Court itself.

And the State Bar also acts independently of the state -- of the central state government. It's governed by its Board of Governors, and it's not controlled by the state supreme court or any other part of the state government.

So this factor doesn't weigh in favor of immunity, it weighs against immunity, and that leaves just one more disputed factor which is the entity's corporate status. Here, again, its status is not one of an ordinary governmental agency. It's status is one of a special sort of government entity, many of which, such as school districts, are certainly not protected by the Eleventh Amendment immunity. And, again, Keller's observation is highly relevant here because the Court in *Keller* recognized that when it comes -- however the State describes this entity, for federal constitutional purposes, it doesn't act like a state agency. When it's -- particularly when it's engaging in political advocacy, it's engaging in private speech and shouldn't be treated like a state agency for purposes of federal constitutional rights.

THE COURT: Thank you very much.

Mr. Wilker?

MR. WILKER: Thank you, Your Honor. Let me be clear. The fact that the State might not have to pay a judgment against the Bar doesn't mean that the State's Treasury funds or the State Treasury isn't enacted. The State has delegated to the Bar administrative functions related to the admission and discipline of attorneys in the state of Oregon. Those functions, if the Bar is forced to pay damages, will then reduce the funds available to perform those functions which will then be a draw in the State budget to achieve that same result.

As for -- excuse me, as for the last point that counsel made, the -- the attack here on the Bar is not simply about particular speech-related activities. The attack here is broader. It's on whether or not these plaintiffs can be forced to join a mandatory integrated bar that provides both discipline admission functions at the direction and delegation of the State Judicial Department and does other things, right, that's -- because that's what makes it integrated. And that broad side attack challenges not merely these associational activities. It attacks the right to be -- to be -- the right of the State to compel membership in this integrated bar. And because of that, it directly impacts a governmental function that the Bar serves, which is the administration of the

disciplinary system and the administration of the admission system, and it does so under a delegation of authority from the Judicial Department.

That the Judicial -- that the Supreme Court ultimately may review disciplinary cases doesn't change the fact that the Bar performs an integral function in both creating a record and, in many cases, in implementing a sanction against a lawyer for violating its provisions. Only certain kinds of cases are subject to automatic review at the Supreme Court in terms of that. And so if the -- if no review is sought, the discipline imposed by the Bar is the discipline of the State of Oregon's Judicial Department on that lawyer.

THE COURT: Okay. Thank you.

MR. SPENCER: Your Honor, one question the Court had was the impact of the other cases that did not discuss *Mitchell*, and that wasn't discussed, and I would like to bring that up.

In reviewing those cases, they relied entirely on either the *Hirsh* case, at 67 F.3d 708, or the *Paulson* case. I don't have that right here in front of me. But, anyway, another Ninth Circuit case. If you look at those cases, they relied upon cases predating *Mitchell*. And at no point did any of the district court cases in Oregon or these Ninth Circuit court cases discuss *Mitchell* whatsoever. They just relied on older cases and said, well, obviously, this -- there was no

evaluation of whether or not the Bar was an arm of the State. They just said it is.

So the question you have is is *Mitchell* the law in the Ninth Circuit, if properly raised, or do we just say it is? We believe *Mitchell* is the law. If you do the *Mitchell* analysis, as we said, then the Court sees where that goes.

So that's why we distinguished these as that they -- this issue apparently wasn't raised because it was not discussed in those cases, even at the Ninth Circuit, post-*Mitchell*. Is *Mitchell* still good law? Is that how we decide it? Has that ever been decided with, you know, any state bar anywhere in the Ninth Circuit? The answer is no. *Mitchell* has never been used in that fashion. Why? We don't know.

It's one of those things we have where the higher court sets out a rule and then ignores it, perhaps, later on. We have to deal with that as lawyers. But we believe *Mitchell* is the proper means of complying with the United States Supreme Court's requirement that a determination be made whether the entity is an arm of the state, the Ninth Circuit has come up with a great test. That is the only test, and we should use that test -- the *Mitchell* test.

MR. HUEBERT: May I add something, Your Honor, in response to the points that were made?

THE COURT: Certainly.

MR. HUEBERT: Regarding the idea that the judgment

against the Oregon State Bar could affect the State Treasury, the question is whether a judgment against the State Bar would be paid out of the State Treasury. And the only judgment for monetary judgment -- the damages that we would have against the State Bar in this case would be to recover the dues that these individual plaintiffs have paid. That's the only monetary impact on anybody here, and that would certainly not come out of the State Treasury.

As for the suggestion that granting us declaratory injunctive relief would affect the State Treasury, as an initial matter, again, that is not relevant to what the *Mitchell* test is looking at; and, secondly, if we were to prevail here and the mandatory bar association were to be declared unconstitutional, then, of course, the State would have to adopt a new regulatory scheme, and that scheme could still charge lawyers for the cost of regulating them, which is what state supreme courts do in other states where you don't have a mandatory bar association.

So even there, there's no reason to think that the State Treasury is going to be affected by the outcome of this litigation.

THE COURT: Okay. Thank you.

MS. DOZONO: Your Honor, if I may respond to some of Mr. Spencer's points in regards to how courts in Oregon and the Ninth Circuit have reviewed these bar cases since *Mitchell*. On

page 4 of our reply brief, we cited to you one, two, three, four -- four District of Oregon cases all decided post-*Mitchell*, as well as *Eardley*, a Ninth Circuit case that was decided post-*Mitchell*, holding that the Oregon State Bar was -- is immune under the Eleventh Amendment.

So this is difficult for us to understand how there is an argument that the Ninth Circuit itself, in reviewing the Eleventh Amendment immunity post-*Mitchell*, would not have considered those factors even though they may not be detailed within the opinion.

In addition to the point that Mr. Huebert just made, the -- you know, the Oregon Supreme Court has decidedly addressed the issue of, you know, how corporate status affects whether or not the Bar is an arm of the State. That a state bar is subject to numerous laws of the state, regulating state agencies, it performs functions on behalf of the judicial department. It is subject to the public records law. It is subject to the Tort Claims Act. It has all these responsibilities of the state government.

And that is what the Ninth Circuit in *Alaska Cargo* focused on, in terms of the first and the second factors, that you cannot divorce the first and second *Mitchell* factors in deciding whether or not an agency is an arm of the state. It's not just whether a money judgment is paid. You have to look at the totality of the circumstances as to whether or not you are

truly performing a vital government function, and the Oregon State Bar in this case is.

THE COURT: Okay. Anything further?

Can we move on to the 12(b)(6)?

MR. HUEBERT: One very short point on that, and that's simply that the defendants here haven't shown that these facts about the Oregon State Bar distinguish it from the State Bar of California, which perform highly similar roles, and, again, was treated in the Supreme Court as not an ordinary governmental agency.

And as for the Ninth Circuit authorities and the district court authorities, all of those are either unpublished or district court opinions, and therefore none of them is binding on this Court, and so the Court's responsibility is to follow the Ninth Circuit's instructions to apply the factors.

Thank you.

THE COURT: Thank you. Defendants, on your 12(b)(6) failure to state a claim argument, please.

MS. DOZONO: Your Honor, since I -- I -- since you have read all the briefs, I will keep these comments fairly short. We believe that this is a fairly straightforward motion because this Court is bound by Supreme Court and Ninth Circuit precedent to deny plaintiffs' three claims for relief. Their claims, in essence, are that the State should -- that lawyers should not be forced to pay mandatory dues, that they cannot be

compelled to pay for political speech without adequate safeguards, and they cannot be compelled to pay for political speech without affirmative consent. The Supreme Court has definitively ruled on the first issue in 1961, in *Lathrop*, which has been repeatedly affirmed that lawyers can be compelled to join and pay for being members of the State Bar, as noted in *Keller* in 1990 and in *Harris* in 2014.

The *Janus* case, on which plaintiffs attempt to hang their hat, does not overrule *Keller*, *Harris*, or *Lathrop*, and unless and until the Supreme Court overrules *Keller*, it remains the governing law, and the Court is bound to follow that.

In summary, the Constitution does permit compulsory bar membership and mandatory membership fees. A bar may engage in political speech so long as it's germane to the regulation of attorneys or improving the quality of legal services and affords adequate First Amendment safeguards by offering reasonable and prompt opportunity for a hearing before a neutral decision-maker on claims based on allegedly non-germane speech.

THE COURT: Thank you very much.

MR. HUEBERT: Your Honor, *Keller* doesn't control plaintiffs' claim challenging mandatory bar membership for several reasons. One reason why *Keller* doesn't require the Court to dismiss plaintiffs' claim out of hand is because -- we know that based on actions the Supreme Court has taken in a

case called *Fleck v. Wetch*. In *Fleck* in 2017, the Eighth Circuit rejected a challenge of mandatory bar membership and fees, citing *Keller*. And then after *Janus*, the Supreme Court vacated that decision and ordered the Eighth Circuit to reconsider in light of *Janus*.

So if defendants were correct that because *Janus* didn't specifically overrule *Keller* and nothing has changed, then there would have been no reason for the Supreme Court to do that. The Supreme Court knows it didn't specifically overrule *Keller* in *Janus*, and, yet, it thought there was something for the Eighth Circuit to do. Presumably, it wasn't going through the exercise to make them perform a totally useless act. So that's one reason to think that *Keller* doesn't control here.

And in *Janus*, the Supreme Court said that mandatory union fees are subject to exacting First Amendment scrutiny, and in doing so, it overruled the *Abood* case, which hadn't applied exacting First Amendment scrutiny to mandatory public sector union fees.

Now, *Keller* approved of mandatory bar dues by reasoning that a mandatory bar association should be subject to the same rule that applies to a compulsory public sector union. So because *Abood* said it was okay to make public workers pay fees to a union to cover the costs of collective bargaining, it must, therefore, also be acceptable to require attorneys to pay a bar association to cover the cost of regulating attorneys.

Now, of course, with *Abood* overruled, mandatory union fees are subject to exacting First Amendment scrutiny and have been struck down under that standard. And so if we're going to do what *Keller* says, which is to treat a mandatory bar association like a compulsory public sector union, then we should subject the compulsory membership and compulsory fees of a bar association to the same exacting scrutiny that applies to public sector union fees.

And the defendants haven't argued at this stage of the proceedings it could survive exacting First Amendment scrutiny, and that means the plaintiffs have stated a valid claim that should proceed.

Another reason why *Keller* doesn't control the membership claim is because *Keller* explicitly declined to address a broader freedom of association claim that would have argued that plaintiffs have a right not to associate with a bar association that engages in non-germane political speech at all.

The Supreme Court explicitly declined to do that, said that lower courts could address that issue in the first instance, and so that means that this Court can address that issue in the first instance in ruling on plaintiffs' third cause of action. So for those reasons, the Court should not dismiss plaintiffs' third cause of action.

Plaintiffs' second cause of action argues that attorneys

shouldn't be forced -- or can't be forced to pay for any bar association, political or ideological speech, without their affirmative consent. This is based on *Janus* as well, where the Supreme Court said that government workers couldn't be forced to pay for a public sector union's political speech without their clear prior affirmative consent, and it recognized that bar -- or, excuse me, union fees would inevitably be used for political speech. And so the only way to protect workers' First Amendment rights was to not take money from them at all without their affirmative consent in advance.

And the same is true here. There's no dispute that the Oregon State Bar uses member dues for various kinds of political speech. And so the only way to protect members' First Amendment rights is to say you can't take any money that will be used for political speech without a member's clear prior affirmative consent.

There's no justification for making them pay fees to this organization when the State could serve its interest -- its compelling interest in approving the quality of legal services by simply regulating attorneys directly without forcing them to join or pay money to a bar association that engages in political speech.

Regarding plaintiffs' first claim for relief, this claim is an alternative claim that assumes that *Janus* didn't change anything and that the law is the same as it was before *Janus*

and *Keller* applies the same as ever. *Keller* said that bar associations have to provide certain protections to ensure that attorneys' mandatory dues are not used for political and ideological speech and other activities that are not germane to improving the quality of legal services, and the Court said that procedures that would satisfy the constitutional requirement are those that the Court prescribed for public sector unions in *Hudson v. Chicago Teachers Association*, and those factors are, one, providing an adequate explanation for the fee that's charged; two, providing an opportunity -- a reasonably prompt opportunity to challenge the fee; and, three, putting any funds that are disputed into escrow while a dispute is pending.

Here the Oregon State Bar, at a minimum, doesn't satisfy the first and third of those requirements. It doesn't provide an adequate explanation for its fee. It doesn't explain whether or how it determines whether its expenditures are germane to the purpose of improving the quality of legal services. It apparently proceeds on the assumption that everything that it does is germane and then leaves it to lawyers to figure out whether that's true and challenge anything the lawyer believes is not germane. That is not enough when they're not providing the information up front on whether and how this determination was made.

And we know in 2018 that the State Bar did use funds for

political speech that wasn't germane in publishing these two Bar Bulletins that the plaintiffs objected to; but, nonetheless, in 2019, the State Bar has gone on and -- to assume once again that everything it will do is germane.

Under *Hudson* and *Keller*, that is not what it's supposed to do. It's not enough to protect attorneys' First Amendment rights.

With respect to the third factor, there's no dispute that the Oregon State Bar does not put money in escrow when there is a dispute, as *Hudson* and *Keller* require, and that requirement is important because it ensures that an attorney's money will not be used for any length of time in any amount to subsidize political and ideological speech and other non-germane activities that the attorney has a First Amendment right not to pay for.

So for those reasons, even -- regardless of how the Court rules on the second and third claims for relief, it should deny the motion to dismiss with respect to the first claim for relief.

THE COURT: Thank you.

MS. DOZONO: Your Honor, on the exacting scrutiny point, in our brief, we review the *Harris* case, and the *Harris* case does say that compulsory bar dues still do meet the exacting scrutiny standard, and they applied exacting scrutiny in that case. They said that Bar members could not be required

to pay for dues for political or ideological purposes but could be required to pay for activities connected with proposing ethical codes and disciplining bar members and that the rules serve the State's interest in regulating the legal profession and approving the quality of legal services.

They recognize that states have a strong interest in allocating to lawyers, as well, the costs of policing their own ethical practices and opposed to that of lawyers.

So on the exacting scrutiny point, *Harris* still says that *Keller* still controls.

And the reason that *Keller* still controls is, I think, highlighted by some of plaintiffs' arguments trying to so closely align the bar membership with union membership. Bar members are not union members. They are a different group of people who are officers of the court and required to uphold the justice system.

So in terms of the speech without affirmative consent, you're talking about political speech. And in the Ninth Circuit cases of *Morrow* and *Gardner*, both of which are motion to dismiss cases -- the *Gardner* Ninth Circuit court noted that undoubtedly every effort to persuade public opinion is political in the broad sense of that term; however, what *Keller* found objectionable was not political activity but partisan political activity, as well as ideological campaigns, unrelated to the Bar's purpose.

Here, the speech that the Bar engages in seeks to be *Keller*-pure, and that is the reason you don't have a segregated set of funds as you have would in a union where you may have germane versus non-germane speech. All of the Bar's expenditures are focused on germane speech.

To the extent that somebody believes that that speech is not germane, there are -- there are procedures in place in the Bar bylaws that allow a member to seek prompt review of any allegations that the speech that the funds were used for was not germane.

Plaintiffs used those procedures in this case.

And so the *Hudson* factors that the plaintiffs reviewed, as well, require the adequate explanation of the funds and the opportunity to challenge and the escrow. And, again, the escrow analogy here makes no sense because, again, you are not -- you're not distinguishing between chargeable versus nonchargeable fees as you are in these agency shop cases where you have some union members and some nonunion members who are choosing to either fund or not fund a union membership and what speech the union wishes to engage in as a whole.

So you don't -- it is completely different than the union cases. The statements that plaintiffs raise, the Ninth Circuit cases in both *Morrow* and *Gardner* both dealt with campaigns that dealt with the image of lawyers to the general public, and the *Gardner* case said it is no infringement of a lawyer's First

Amendment freedoms to be forced to contribute to the advancement of the public understanding the law.

And in this case, the statements that plaintiffs have complained about does just that. The statement by the Oregon State Bar stood up against white supremacy and the normalization of violence and speech that incites violence. And both of those statements are germane to the ability of citizens to have faith in their government, in the lawyers that they -- in the lawyers and the judges and the justice system to uphold the law equally to all people.

MR. WILKER: I just wanted to add briefly. I concur with everything that Ms. Dozono said, but the comment about the impact of what is the summary reversal and remand to the Eighth Circuit in *Fleck* means, it means nothing with respect to this case because the Court didn't overrule *Keller*.

What it said to the Eighth Circuit is, "You relied on *Abood*. We just overruled *Abood*. You need to reanalyze your case without *Abood*." Presumably, that is what the Eighth Circuit will do. Presumably, if the plaintiffs there don't like the result, they will take it up.

I'll also suggest to the Court, for the reasons Ms. Dozono just explained, the difference between having an opt-out or non-germane speech and trying to -- and what the Oregon approach is distinguishes this case from *Fleck* itself.

Oregon aims its bylaws provide for the germane purposes

for which the Bar may act when they speak. If it makes a -- what the plaintiffs claim is a mistake in that function, it provides a remedy and a swift remedy to seek a refund of those portions of their -- of the Bar fees that may have been used for things that are non-germane, and plaintiffs had that available to them and chose not to -- and chose not to pursue it. That doesn't mean it's not available and that doesn't create a constitutional claim simply because they have refused to use the procedure that's available and that meets the requirements of *Keller*.

Had the Bar, like other bars, decided that some portion of its bar dues would be used for political speech that was outside the bounds of *Keller*, it would create some fund to do that.

The *Chicago Teachers* case is different. The *Chicago Teachers* case involves an advance -- an interim fee and an advance use of the funds and, therefore, the procedure needed to be in place in the front end. Here, the Bar doesn't intend to do anything and speak in any fashion that's not germane. And as a result of that, there's no point. The Bar would simply say, "A hundred percent of our fees are for germane activities and here's our budget," and then if a plaintiff disagrees with that, they can challenge it.

But these plaintiffs haven't done that. They've simply filed this lawsuit rather than avail themselves of the

available remedy within the State Bar's bylaws to seek a refund of that portion of their fees.

As for the escrow, it makes no sense if you're not reserving any funds in advance for these kinds of activities. And when plaintiffs -- had plaintiffs, in fact, sought a refund and obtained one, they got interest on their money from the date it was determined. This is simply a meaningless argument that doesn't advance the case here where we're talking about an organization that strives to do only that which *Keller* permits it to do.

And for that reason and for the reasons we've already articulated, the Supreme Court's holding in *Keller* is controlling. It hasn't been reversed. It hasn't been reversed in silence by the Court. It hasn't been reversed in *Fleck*. It was certainly referred to and reaffirmed to the extent in *Harris* where the Court said it fits comfortably within the framework it was adopting. And for those reasons the plaintiffs' claims need to be dismissed.

MS. DOZONO: If I may gently correct one point of my esteemed co-counsel? The plaintiffs in the Crowe case did -- in their complaint, they do note that they contacted the Oregon State Bar to inform them of their objections. They did request a refund, as the -- as the bylaws require, and they also received refunds from the Oregon State Bar.

MR. WILKER: I wasn't suggesting otherwise. They

didn't avail themselves of the arbitration procedure provided in the bylaws to challenge that.

THE COURT: Okay. Thank you very much.

Any response, sir?

MR. HUEBERT: Yes, Your Honor. First, *Harris v. Quinn* does not say that mandatory bar membership or fees can survive exacting First Amendment scrutiny. It doesn't address that question at all. *Harris v. Quinn* does recognize that the State has a compelling interest in regulating the legal profession, and it says it has an interest -- a strong interest in requiring lawyers to pay for the cost of that regulation, but it doesn't address the other part of exacting scrutiny, which is whether there is another -- there is a way that a state could serve those compelling interests that wouldn't -- that would infringe significantly less on First Amendment rights. *Harris* simply doesn't get into that question at all, and, therefore, it says nothing about whether mandatory bar membership or fees would survive exacting First Amendment scrutiny.

Regarding the claim that bar members are not union members, well, they're not; but *Keller* said it's appropriate to treat them as the same, and that part of *Keller* hasn't been called into question by anything.

The defendants argue that they -- they strive to comply with *Keller*. They are not trying to engage in any

inappropriate political speech. They say they do provide appropriate procedures, but those are all factual questions. Those rely on things that are not in the complaint in this case and aren't resolved simply by taking judicial notice of the Bar's bylaws.

The question of what kind of speech they engage in and how their procedures actually work is something that is appropriate to explore in discovery and resolve either through a motion for summary judgment or a trial. It's not an issue that is appropriate for disposing on a 12(b)(6) motion.

THE COURT: Thank you.

MR. SPENCER: Your Honor, I would like to talk a little bit about the Court's question that somewhat touched on this. We do have *Keller* out there. And then, obviously, *Abood* didn't go and look at every case it relied on and said we're overturning that.

The question is did the *Fleck* case effectively overturn *Keller*? And I think in this situation -- and *Fleck* is important because it is as close to this case as we have. This is a case where the North Dakota Bar -- you had to -- you have to be a member of the North Dakota Bar in order to practice law.

Now, North Dakota did provide a means you can opt out of that, at least to some extent, and there is some challenge about that and whether you -- you have to do an opt-out or an

opt-in. Oregon is even worse. We don't have an "opt-out in advance" process. They don't even give us an opportunity in the state of Oregon to do that. So at least that part of it is there.

Counsel said, well, what the Supreme Court said in *Fleck* was, well, *Abood*'s no good. Eighth Circuit, go back and review this.

The Eighth Circuit did not rely on *Abood* in making its decision originally. If you look at our reply brief on page 2, we quote the part -- and it's a very small paragraph where they talk about it. They affirm the district court based on its ruling on *Keller* only, not on *Abood*. It had absolutely nothing to do with *Abood*. If you look at either the district court case or the Eighth Circuit case, you won't find a reference to *Abood*. You find a reference to *Keller* and only *Keller*.

So when the Supreme Court takes this case on, they have three options, basically. The first option, they could have denied cert. What would that have meant? That meant *Keller* certainly applied. They didn't do that. They could have accepted cert, had briefing, written an opinion, and then sent it back to the Eighth Circuit for a decision in conformance to whatever it decides, and then they could have specifically said, yes, you know, *Keller* is overturned; or they could have taken their third option and said, no, we're not even going to waste our time having oral argument and briefing. *Keller*

doesn't apply anymore. *Janus* does. Eighth Circuit, review this. Deal with your opinion based on what *Janus* says.

What is *Janus?* *Janus* is not a labor law case. Defendants keep talking about unions and stuff. *Janus* is a First Amendment case. And the most important statement in *Janus* is where the Supreme Court said in First Amendment cases we will no longer allow a rational basis analysis. You have to use exacting strict scrutiny, or maybe, if you happen to be commercial speech, highest scrutiny.

And I agree with co-counsel here that *Harris* never conducted any analysis under any scrutiny. First off, all of the discussions about *Keller* are dicta. They were responding to concerns, but they weren't -- this was not a review of a state bar case.

What happened in *Harris* is they told -- in that case the State of Illinois -- that you don't have sufficient justification to regulate these part-time employees at all. You can't make them be a member, not because of speech issues, but you can't even get there because you haven't met the first part of it -- of a compelling state interest.

So they said, yes, but that doesn't change what we said in *Keller*. Yes. State's have a compelling state interest to regulate attorneys. We don't disagree with that. But that's a two-part test. Once you get to that, then you have to look at how they do it. Have they complied with the scrutiny level

required by the court? And if you look at *Keller*, or even before that, *Lathrop*, those were all rational basis tests. *Keller* did not change *Lathrop* as to even the other speech, the non-germane speech -- or the germane speech. That was a rational basis test.

Janus just says, no, it doesn't work that way. This is speech. All speech is protected. It doesn't matter whether it's germane or non-germane. All speech is protected. You can't regulate speech. You can't make people pay for someone else's speech, nor can you tell people they can't speak. It's looked at the same way. *Janus* is a First Amendment case, not a labor law case, and it needs to be reviewed that way.

Fleck effectively overturned *Keller*. It can have no other interpretation than to do that. Otherwise, they would have denied cert entirely if *Keller* applied in the Supreme Court's opinion. Or if they weren't certain, they would have had briefing.

Three options, deny cert, and that affirms *Keller*, and there's no question. We go up and we try to convince them to change their mind. They can argue it and we'll see what their decision was or what they did. They made a decision. They said *Keller* isn't what you look at this at. Look at it under *Janus*. There is no other way to read *Fleck* than to say that overturned *Keller* without them coming out and saying it. There's no other way that has to go because there's no reason

to look at *Janus* if *Keller* is good law. There's absolutely no reason why the Eighth Circuit should even think about *Janus* if *Keller* is still good law.

Thank you.

MR. HUEBERT: I would like to clarify a point on which we may differ from the plaintiffs in the other case on these issues, if I may.

THE COURT: Remind me, Mr. Huebert, which case are you?

MR. HUEBERT: I'm counsel for the Crowe plaintiffs.

THE COURT: Crowe.

MR. HUEBERT: It's not the Crowe plaintiff's position that *Fleck* overruled *Keller*. It's the Crowe plaintiff's position that *Fleck* simply indicates that the Supreme Court considers it appropriate for lower courts to consider, in the first instance, whether mandatory bar membership and mandatory bar fees used for political speech are constitutional in light of *Janus*. And that just means that *Keller* doesn't necessarily require a dismissal of the case out of hand, but I wouldn't say that *Fleck* overturned *Keller* because the type of order the Court issued simply couldn't do that.

That's all.

MS. DOZONO: On the *Harris* case and the issue of exacting scrutiny, *Harris* was an exacting scrutiny case. The language in Section B of the -- of the *Harris* decision says

this decision fits -- this decision fits comfortably within the framework applied in the present case. Exacting scrutiny. It's a -- our decision in this case is wholly consistent with our holding in *Keller*.

So the Supreme Court in *Harris* is applying exacting scrutiny to the issue of mandatory dues and saying that the *Keller* case still meets the exacting scrutiny standard.

In terms of whether or not this is appropriate for a motion to dismiss, in their complaint the plaintiffs merely have these bare assertions that -- that the procedures are inadequate, and that is simply insufficient under *Iqbal* and *Twombly*.

The *Eugster* case -- the district court case out of the District of Washington, in *Eugster*, said that bare assertions that activities are nonchargeable is legally conclusory and insufficient. You have to plead facts that give rise to a reasonable inference that unreimbursed activities paid for are unrelated to regulating the legal profession and improving the quality of legal services.

And plaintiffs in the Crowe case have made no assertion that statements that condemn white supremacy and normalization of violence do not have to do with regulating the legal profession and improving the quality of legal services.

When you have cases in the Ninth Circuit that were decided on a motion to dismiss, it had to do with public relations and

public image campaigns as to whether lawyers can be relied on by the general public to uphold the rule of law and for all citizens to believe that they get a fair shake when they come to the Court for resolution of their grievances, that is -- that is, under *Keller*, improving the quality of legal services available to the people of the state.

MR. WILKER: Your Honor, I just wanted to make one last point. It's actually a procedural point. I wanted to bring it to the Court's attention. When plaintiffs in the Gruber case filed their first amended complaint, we've -- and added parties, we then refiled our motion to dismiss. They did not refile any of their opposition papers. They did not refile their summary judgment papers. As a technical matter, our motion is effectively unopposed.

More to the point, their motion no longer -- their motion for summary judgment no longer exists because it's been superseded by a subsequent pleading. And the authority for that, Your Honor, in the Ninth Circuit, include *Rhodes v. Robinson*, 621 F.3d 1002, at 1005 -- it's a 2010 case -- as well as *Ramirez v. City of San Bernardino*, 806 F.3d 1002 and at 1008, which is a 2015 Ninth Circuit case.

Because the new pleading superseded the prior pleading, as a technical matter, the plaintiffs, if they wish to re-present their positions, they needed to actually file -- refile their motion and refile their opposition. They haven't done so. I

just bring that to the Court's attention because it is a technical defect in the pleadings as they stand now.

THE COURT: Thank you.

Sir?

MR. SPENCER: Obviously, this is the first time this has been raised, so I haven't had an opportunity to research our case, and I'm not in a position to argue that one way or the other. If we have to refile, we will refile it. However, I do want to make one final comment, and it goes to quote to *Harris*. The quote properly speaks -- says this decision fits comfortably within the framework applied in the present case. And it's talking about *Keller*. It doesn't say it comfortably fits within exacting scrutiny.

Again, we get back to what was the decision based on in *Harris*? It never did an analysis under any scrutiny. It relied on the first part of the test, and that's what our point is. We're not trying to put words into the decision. Look at the exact words in there rather than putting in parentheses exacting scrutiny instead of something else. I think that's very important in reviewing *Harris*.

Thank you.

THE COURT: Thank you very much. Again, I appreciate everybody's briefing and thoughtful and helpful comments today and argument today. These cases are designated related, and I guess that is sufficient. The other option would be to

consolidate the cases. I don't care, frankly.

Do plaintiffs have an opinion about that?

MR. HUEBERT: Related is good for us.

MR. SPENCER: For us, as well.

THE COURT: I'll maintain the related status, then. Thank you. I appreciate your time.

DEPUTY COURTROOM CLERK: Court is adjourned.

(Hearing concluded.)

C E R T I F I C A T E

Diane L. Gruber, et al. v. Oregon State Bar, et al.

3:18-cv-01591-JR

and

Daniel Z. Crowe, et al. v. Oregon State Bar, et al.

3:18-cv-02139-JR

ORAL ARGUMENT

March 13, 2019

I certify, by signing below, that the foregoing is a true and correct transcript of the record, taken by stenographic means, of the proceedings in the above-entitled cause. A transcript without an original signature, conformed signature, or digitally signed signature is not certified.

/s/Jill L. Jessup, CSR, RMR, RDR, CRR, CRC

Official Court Reporter
Oregon CSR No. 98-0346

Signature Date: 6/18/19
CSR Expiration Date: 9/30/20